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BALANCING EFFICIENCY, EQUITY, AND VOICE IN WORKPLACE DISPUTE RESOLUTION PROCEDURES

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Abstract

Systems for resolving workplace disputes are very important to workers and firms, and have been the subject of much debate. In the United States, traditional unionized grievance procedures, emerging nonunion dispute resolution systems, and the court-based system for resolving employment law disputes have all been criticized. Much of the existing debate on workplace dispute resolution, however, has been atheoretical, with a focus on techniques of dispute resolution rather than the goals of the system. What is missing from the debate are fundamental standards for comparing and evaluating dispute resolutions systems. In this paper, we develop efficiency, equity, and voice as these standards. Unionized, nonunion, and employment law procedures are then evaluated against these three standards.

The resolution of workplace disputes is a defining feature of an employment system. Whether rights disputes are resolved through a formal arbitration system or a peer review panel or a court or unilateral managerial discretion—to name just four options—the nature of the employment relationship will be very different. The design and operation of workplace dispute resolution systems are therefore longstanding issues in human resources and industrial relations. The sharp debates over nonunion dispute resolution systems and the mandatory arbitration of employment law claims in the wake of *Gilmer v. Interstate/Johnson Lane Corp.* (1991) and other Supreme Court decisions underscore the continued importance of these longstanding issues (Colvin, 2003a; LeRoy and Feuille, 2003; Stone, 1996).

But what are the metrics for evaluating workplace dispute resolution systems? For human resource managers to design effective dispute resolutions systems, for union leaders to advocate certain systems, and for policymakers to promote or restrict various systems, we must identify the important dimensions for comparing dispute resolution systems. But these dimensions are not always clearly articulated in scholarship or in practice. We extend Budd's (2004) analyses of the objectives of the employment relationship and assert that the metrics for evaluating and comparing systems of dispute resolution are efficiency, equity, and voice. Moreover, dispute resolution systems should *balance* efficiency, equity, and voice. This analytical framework applies to dispute resolution systems in a wide variety of contexts—disagreements over employment conditions, workplace rights, legal rights outside of the workplace, marital dissolution, and global trade agreements, for example. This paper focuses on workplace rights disputes.[1]

[1] In employment scholarship it is common to distinguish between interest disputes and rights disputes. Interest disputes pertain to conflicts of interest such as higher wages (the employees' interest) versus lower labor costs (the employer's interest). Interest disputes might manifest

Efficiency, Equity, and Voice

Budd (2004) argues that the objectives of the employment relationship are efficiency, equity, and voice. Efficiency is the effective, profit-maximizing use of labor and other scarce resources and captures concerns with productivity, competitiveness, and economic prosperity. Equity entails fairness in both the distribution of economic rewards (such as wages and benefits) and the administration of employment policies (such as nondiscriminatory hiring and just cause discharge). Voice is the ability of employees to have meaningful input into workplace decisions both individually and collectively. Efficiency is a standard of economic or business performance; equity is a standard of treatment; voice is a standard of employee participation. Budd (2004) further analyzes alternatives for workplace governance, union strategies, and comparative industrial relations systems—but not dispute resolution systems—against the standards of efficiency, equity, and voice.

In this paper we apply this framework to dispute resolution procedures. In particular, we argue that the critical dimensions of dispute resolution procedures are efficiency, equity, and voice. This provides a rich analytical framework in which researchers can analyze and compare dispute resolution systems along the dimensions of efficiency, equity, and voice. We further argue that dispute resolution systems should *balance* efficiency, equity, and voice. This provides a rich normative framework in which practitioners and policymakers can design optimal dispute resolution systems by constructing systems that balance efficiency, equity, and voice. To this end, we first define efficiency, equity, and voice in the context of dispute resolution procedures. The remaining sections of this paper analyze unionized, nonunion, and employment law dispute

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themselves as strikes or quits and might be resolved through mediation, arbitration, or other methods. In contrast, rights disputes are disagreements over whether someone's rights have been

resolution procedures for resolving rights disputes against the standards of efficiency, equity, and voice.

An efficient dispute resolution system is one that conserves scarce resources, especially time and money. Systems that are slow and take a long time to produce a resolution are inefficient; systems with shorter timeframes that produce a relatively quick resolution are efficient. Similarly, dispute resolutions systems that are costly are inefficient. Costs can stem from various features of a dispute resolution system such as the need for high-paid experts or the involvement of numerous participants.[2] For workplace dispute resolution systems, another aspect of efficiency is the extent to which the system fosters productive employment. Preventing strikes or providing unconstrained managerial decision-making are elements of dispute resolution systems that promote this aspect of efficiency.

Equity in the context of dispute resolution systems is a standard of fairness and unbiased decision-making. Outcomes in an equitable system are consistent with the judgment of a reasonable person who does not have a vested interest in either side. Equity also requires that the outcomes provide effective remedies when rights are violated. Individuals in similar circumstances should receive similar treatment and face similar, though not necessarily identical, resolutions. Moreover, an equitable system treats the individual participants with respect,

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violated—rights granted through an employee handbook, a union contract, or an employment law.

[2] Our analyses focus on the participant level rather than the systemic level of a dispute resolution system. In other words, we focus on the efficiency, equity, and voice aspects for individuals and organizations actively engaged in using a specific dispute resolution system rather than the systemic incentives provided by the existence of a specific procedure. A court system or a strike, for example, can be very costly for those using it, but might be considered efficient on a systemic level if these costs provide incentives for the parties to resolve issues before they become disputes. These incentives are important aspects of dispute resolution systems for interest disputes where the alternative is typically a negotiated settlement. For rights disputes, however,

sensitivity, and privacy. Equity also includes the extent to which outcomes are linked to objective pieces of evidence and to the existence of safeguards—such as the ability to appeal decisions to a neutral party—to prevent arbitrary or capricious decision-making. An equitable dispute resolution system has widespread coverage independent of resources or expertise.

The voice dimension of dispute resolution systems captures the extent to which individuals are able to participate in the design and operation of a dispute resolution system. This dimension includes important aspects of due process such as having a hearing, presenting evidence in one's defense, and being assisted by an advocate if desired. Voice also measures the extent to which individuals have input into the construction of the dispute resolution system and into specific resolutions.

Note that equity and voice might both be casually described as fairness or justice and therefore there might be a temptation to combine the two dimensions. But equity and voice are different and require separate analyses. The equity dimension focuses on outcomes whereas the voice dimension focuses on participation in the process. A dispute resolution system can be equitable (by producing unbiased outcomes) but lack voice, or can include voice but be inequitable.

The metrics of efficiency, equity, and voice have some relationship to the standards of distributive and procedural justice often used to evaluate fairness in dispute resolution systems, but also capture considerations not included within this type of justice framework. Issues of distributive and procedural justice are clearly relevant to the evaluation of equity in dispute resolution systems. By contrast, efficiency is a metric that is not well captured in the distributive and procedural justice framework, yet in our view is an important consideration in evaluating the

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the alternative is typically some other dispute resolution system so we focus on the participant

functioning of a dispute resolution system. Furthermore, while some aspects of procedural justice would be included within the voice metric, the idea of voice goes beyond procedural fairness in the conduct of hearings to include broader issues such as input into the design of the system and the rules under which decisions are made.

The metrics of efficiency, equity, and voice provide an analytical framework for analyzing the extent to which different dispute resolution systems provide each dimension or not. This analytical approach provides a deep understanding of different systems, but does not judge them. The goal of practice and public policy, however, should be to design and implement the best dispute resolution system for various settings. This raises normative issues of what dispute resolutions systems *should* do. First note that efficiency, equity, and voice might often conflict with each other. Equity requires objective evidence, unbiased decision-making, and appeals to neutral parties whereas voice entails participating in hearings. These two dimensions can conflict with each other (such as when third party control overrides the voices of the participants) and together they can conflict with the efficiency emphasis on quickness and low cost. Against this backdrop of potentially conflicting dimensions, we assert that dispute resolution systems should *balance* efficiency, equity, and voice.

The importance of balancing competing objectives is rooted in the need to balance the competing rights of various stakeholders. In particular, an employer's property rights to use their employees as they see fit must be balanced with employees' rights to equity and voice. This is because work is a fully human activity, not a purely economic transaction, so employees as well as employers have human rights in a democratic society (Budd, 2004). Taking a slightly different tack, due process protections in the civil arena are so important that they are written directly into

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the Magna Carta and U.S. Constitution; these rights are so critical that they should not be checked at the factory gate or office door and disregarded in the employment relationship.

There is also an analytical rationale for balancing efficiency, equity, and voice: pluralist industrial relations thought predicts that employment systems work better when competing interests are balanced than when imbalances or inequalities exist (Budd, Gomez, and Meltz, 2004). Workplace dispute resolution systems are therefore hypothesized to be more effective and stable when efficiency, equity, and voice are balanced. Compared to unbalanced dispute resolution systems, balanced systems should have greater legitimacy, produce more effective and durable resolutions, and prevent the recurrence of disputes. As a result, practitioners and policymakers should design dispute resolution systems that balance efficiency, equity, and voice. With this foundation, we now turn to analyzing specific systems for resolving workplace rights disputes.

Unionized Workplace Procedures

In the United States, workplace dispute resolution systems for addressing rights disputes are most widespread and developed in the unionized sector. Today, nearly every union contract in the United States—in both the private and public sectors—contains a grievance procedure to resolve allegations by employees and/or the union that the employer has violated the contract. Nearly all contracts in both the private and public sectors also include binding arbitration as the last step of the grievance procedure, and a few states even require it for public sector contracts. The importance of grievance arbitration for the resolution of rights disputes in U.S. unionized workplaces cannot be overstated. However, in response to concerns with the cost, timeliness, and quasi-legal nature of grievance arbitration, the unionized sector is also experimenting with

expedited arbitration systems and with grievance mediation systems. All three systems can be usefully analyzed against the metrics of efficiency, equity, and voice.

Grievance Arbitration

Grievance arbitration, or rights arbitration, involves a hearing before a third-party neutral (the arbitrator) over a dispute over a provision of a union contract. The arbitrator issues a decision that is binding on the parties and therefore resolves the rights dispute. U.S.-style grievance arbitration has evolved into a formal, quasi-judicial process in which the arbitrator's sole job is to interpret—not adapt or modify—the union contract just as a judge interprets the law. An arbitration hearing is therefore like a courtroom hearing; both labor and management present witnesses and evidence, these witnesses are cross-examined, and each side presents opening and closing statements. The traditional legal rules of evidence are not strictly applied—for example, hearsay evidence might be allowed—but evidence plays a determining role in the grievance arbitration process. Past practices and precedents from earlier arbitration decisions are also very important elements.

Relative to court proceedings in the U.S. legal system or to strikes, the grievance arbitration dispute resolution system is efficient. It is less costly than both of these options and can also enhance productive efficiency by preventing work stoppages and by identifying areas of conflict. On the other hand, relative to less formal dispute resolutions procedures, grievance arbitration is criticized for being lengthy (perhaps a year from grievance filing to arbitrator decision) and costly (perhaps $10,000 or more per hearing) (Feuille, 1999). The quasi-judicial nature of grievance arbitration with a strong reliance on past precedents can also be criticized for inhibiting flexibility and change. This system is also reactive and backward looking to determine

guilt or innocence rather than forward looking and proactive to solve problems. As such, there are efficiency concerns with grievance arbitration.

Grievance arbitration is evaluated highly with respect to the equity dimension. The threat of a binding decision by a neutral third party provides labor and management with the incentive to try to settle grievances fairly and to respect due process throughout the steps of the grievance procedure. Formal hearings and reliance on credible, objective evidence are central features of the U.S. grievance arbitration system. The binding decisions by neutral arbitrators provide effective mechanisms for remedying unfair treatment in the workplace. Workers found to be fired without just cause, for example, are reinstated with back pay. Moreover, these decisions commonly rely heavily on past arbitration precedents and past workplace practices. As a result, there is a high degree of consistency in decision-making across cases so workers who have similar grievances in similar circumstances receive similar treatment. This consistency is an important component of equity.

With respect to voice, the evaluation of grievance arbitration is mixed. As grievance arbitration systems are negotiated rather than imposed, labor and management have a high degree of voice in establishing the process. Moreover, both sides participate equally in all steps of unionized grievance procedures and the various parties are represented by attorneys or other advocates as desired in arbitration proceedings. There are strong traditions of fulfilling basic due process rights such as being heard and presenting evidence. On the other hand, the bureaucratic nature of traditional grievance procedures and the importance of stewards, union officials, and attorneys rather than individual workers is attacked by critical scholars for stifling rank and file involvement and voice (Klare, 1988; Stone, 1981). Though partly mitigated by the duty of fair representation, union carriage of grievances may also reduce employee voice when the interests

of the union and the individual grievant differ. Lastly, voice is stronger in the process than in the outcome because a third party neutral unilaterally imposes the final resolution to the dispute (though the parties have control over the outcome at the lower stages of the grievance procedure).

Expedited Arbitration

Because of concerns with the efficiency dimension of grievance arbitration, some unionized workplaces are experimenting with expedited arbitration in which there are no written briefs, no transcripts, perhaps no lawyers, and often no written decision. This improves efficiency by reducing costs and fostering faster resolution of grievances. In return, this may reduce equity because of the abbreviated hearings and reduced reliance on precedent. Relative to traditional grievance arbitration, an expedited arbitration system might also reduce voice due to the more limited opportunity to present grievances. Comparing traditional grievance arbitration to expedited arbitration clearly reveals the trade-offs between efficiency, equity, and voice in dispute resolution systems.

Grievance Mediation

A small number of U.S. unionized grievance procedures include a grievance mediation step before the grievance arbitration step (Feuille, 1999). The rationale for this mediation step is to help avoid arbitration and its associated delays, costs, and legal formalities. In other words, grievance mediation attempts to improve the efficiency dimension of grievance arbitration. Relative to an arbitration-only process, there is the possibility that equity suffers because of a reduced role of neutral labor arbitrators in ensuring consistency across grievances, but since the parties retain control of the resolution in mediation, any inconsistencies are agreed to by the parties. Moreover, the parties retain the right to pursue arbitration when mediation fails to

provide a satisfactory resolution. With respect to voice, grievance mediation enhances voice in the results dimension of dispute resolution since the parties are agreeing to a negotiated settlement of the dispute. In the process dimension, however, voice might not be as strong as in grievance arbitration because grievances are being bargained between the union and the employer whereas in arbitration, a more formal presentation of the employee's case is presented.

Nonunion Workplace Procedures

Grievance procedures in nonunion workplaces are not as well developed as those in unionized workplaces, but are becoming more widespread. Recent estimates suggest that as many as half of nonunion workplaces feature some type of formal grievance procedure and that this number is increasing (Feuille and Chachere, 1995). Nonunion workplaces also feature a much greater variety of different types of grievance procedures, ranging from simple open door procedures to more elaborate peer review procedures and ombudsperson systems (Feuille and Delaney, 1992). While nonunion grievance procedures may lack the highly developed institutionalized structure of union grievance procedures, they cover a much larger segment of the overall workforce and are an increasingly important mechanism for regulating workplace conflict. As a result, it is important to examine the relative advantages and disadvantages of the different types of nonunion grievance procedures. The metrics of efficiency, equity, and voice provide a useful way for comparing unionized dispute resolution systems with nonunion systems, and also for comparing the various nonunion alternatives with each other.

Unilateral Management Discretion

Before examining the different types of nonunion grievance procedures, it is worth briefly considering the baseline system in nonunion workplaces where no formal grievance procedure has been introduced. In the absence of a grievance procedure, the response to

employee complaints is left to unilateral management discretion. This situation clearly strongly favors efficiency by allowing unconstrained management decision making in the workplace. If management decides to respond to an employee complaint, they are free to do so. If management decides to reject the complaint, the employee's only alternatives are to accept the decision in silence or use the "exit" mechanism of quitting (Lewin and Mitchell, 1992). This system lacks protections for equity, depending entirely on the goodwill of management. The result is likely to be a high degree of variation in fairness of treatment of employees depending on managerial values, attitudes and personal sense of fairness. This system similarly lacks any structure for employee voice. In making complaints, employees are essentially supplicants, hoping to receive the favor of management in response to their request. Overall, in the absence of any type of workplace grievance procedure, we have the extreme situation of an unbalanced geometry favoring efficiency at the expense of both equity and voice.

Open Door Policies

The simplest type of nonunion grievance procedure is the open door policy (Lipsky, Seeber, and Fincher, 2003). At its most basic, an open door policy could consist of a statement by management that the doors of managers are always open to employees seeking to present complaints or concerns. More sophisticated versions of open door policies can include features such as: the ability of employees to bring complaints to a manager outside of the immediate chain of command; policies discouraging retaliation against employees who make complaints; and provisions to keep track of and follow-up on complaints. IBM is one notable example of a large company that employs a particularly elaborate version of an open door policy in which employee complaints are assigned for investigation to relatively senior level managers (Ewing, 1989). Whether elaborate or simple, however, a key feature of open door policies is that

resolution of the employee's concern is up to the initiative of the manager responding to the complaint. There is no hearing at which evidence is formally presented nor is there a neutral decision-maker to consider the positions of each side and render an adjudication of the dispute.

Open door policies are strongly biased in favor of efficiency over equity or voice. The lack of formal hearing procedures allows decisions to be made through a relatively quick and simple process. The cost to the employee of bringing an open door complaint is very low and so also is the cost to management of responding to the complaint. At the same time, open door policies contain relatively little in the way of equity protections. Open door policies offer a promise by management of fair treatment if employees have concerns, but lack structural protections to ensure fair treatment (Colvin, 2001). Lack of consistency of treatment is a particular weakness of open door policies from the perspective of equity, with no guarantee that managers hearing similar complaints from different employees will provide similar responses. Similarly, while open door policies offer the promise that managers will listen to the complaints of employees, they lack structures ensuring voice. The degree to which an employee is able to adequately explain their complaint is at the discretion of the manager to whom the complaint is presented under an open door policy. Employee voice is also lacking in the outcomes, with even a favorable decision being essentially bestowed from the generosity of management. Overall, the features of open door policies indicate a strong emphasis on efficiency at the expense of both equity and voice.

Management Appeal Procedures

Whereas open door policies typically lack a formal structure for appealing grievances, more formal nonunion grievance procedures often include multi-step appeal procedures that superficially resemble the multi-step grievance procedures of unionized workplaces. Under this

type of nonunion grievance procedure, the employee is informed of the manager to whom a grievance can be presented and the path of subsequent appeals to higher level management if the employee is dissatisfied with the initial response (Feuille and Delaney, 1992). Although the use of multi-step appeals to higher levels in the organization resembles the structure of union procedures, a key difference here is that at each stage of the procedure, managers are the decision-makers. In addition, the employee usually does not have any independent representation in this type of procedure, though in some instances company human resource representatives may provide informal advice or assistance to employees bringing complaints (Feuille and Chachere, 1995). Review or hearing procedures are generally much simpler in this type of procedure than under union grievance procedures. Some procedures involve only written appeals of decisions, others involve simple oral presentation of complaints, while formal hearings with presentation of evidence, examination of witnesses and presentation of arguments are relatively rare. The most elaborate variant of this type of procedure involves the use of a committee or panel of senior managers who serve as an appeals board hearing and deciding employee grievances, however this structure is less common (Feuille and Delaney, 1992).

Management appeal procedures involve some enhancement of equity relative to open door policies or workplaces with no grievance procedure whatsoever, however their relative balance also emphasizes efficiency over equity and voice. The more formal structure for appeals produces some loss of efficiency relative to most open door policies given that greater time and cost is involved in hearing complaints and reviewing appeals of decisions. However, the procedures are still relatively simple and do not create as great a demand on managerial time as more elaborate hearing procedures, such as under union grievance procedures. The more formal structure of procedures and provision of specific steps for appealing unfavorable decisions

provide an enhancement of equity compared to open door policies. On the other hand, retention of management control over decision-making under this type of procedure represents a major due process deficiency and weakness from the equity perspective (Colvin, 2001). Grievance procedures with management decision-makers offer relatively little from a voice perspective. Control over the design, rules, and decision-making under this type of procedure are retained by management and lack employee voice. In addition, the lack of independent representation of employees under the vast majority of these procedures limits the extent of voice in the process of resolving grievances. Thus, the overall geometry of this type of procedure consists of some limited enhancement of equity, little in the way of voice, and a strong imbalance in favor of efficiency.

Peer Review

Peer review procedures differ from typical nonunion grievance procedures in the nature of the decision-maker under the procedure. Instead of managers making the decisions as to the disposition of employee grievances, under peer review procedures employees who are peers of the complainant sit on a panel that decides grievances (Colvin, 2003b, 2004; McCabe and Lewin, 1992). Under a typical peer review procedure, the peer review panel might consist of two managers and three employees who are peers of the complainant, with the key characteristic being that the peer employees comprise a majority of the members of the panel deciding the grievance. Peer review panels are often introduced as part of a union substitution strategy in order to provide employees with a stronger alternative to union grievance procedures than the typical nonunion procedures that use only management decision-makers (Colvin, 2003a).

Peer review procedures involve a re-balancing of efficiency, equity and voice relative to typical nonunion grievance procedures. Some efficiency is sacrificed due to the more elaborate

hearing procedures with peer review panels. In particular, examination of witnesses and documentary evidence by a five member panel will involve substantially greater costs in terms of employee time than a procedure in which a single manager is reviewing an employee's complaint. A key benefit of using a peer review panel from an equity perspective is the greater independence of the decision-makers from management (Colvin, 2003b). Given that peer employees are a majority on the panel, they have the ability to overrule management decisions that they view as unfair. At the same time, it should also be recognized that management establishes the rules under which the panel operates, which may result in limitations from an equity perspective, such as if management includes a rule limiting the panel to deciding whether company policies were correctly applied or not, rather than allowing general considerations of justice or fairness to be used (Colvin, 2004).

Peer review procedures also include a stronger voice element than typical nonunion grievance procedures because employees are included as decision-makers. Voice here is limited to the decision-making aspect of the system. Peer review procedures do not necessarily involve any enhancement of voice in the design of the rules of the system or in the representation of employees in presenting grievance. However, relative to the most nonunion grievance procedures with only manager decision-makers, peer review procedures provide an enhancement of both voice and equity at the expense of efficiency. Although this is often the result of a desire to substitute for union representation, it is noteworthy that peer review procedures represent an effort by nonunion companies to better respond to employee concerns and interests by adopting dispute resolution procedures that better balance efficiency, equity and voice.

Ombudspersons

Ombudspersons represent an alternative approach to resolving disputes in nonunion workplaces (Lipsky, Seeber and Fincher, 2003; McCabe and Lewin, 1992; Westin and Felieu, 1988) that also provides a rebalancing of efficiency, equity and voice. The idea of the ombudsperson was initially developed in the governmental context in Scandinavian countries, where the ombudsperson's office was established as a place where citizens could bring complaints or problems involving dealings with the government that the ombudsperson would help resolve. The idea of the ombudsperson has been adapted to the corporate context, where an ombudsperson's office serves as an alternative resource or place for employees to bring complaints and problems and obtain assistance in resolving them (McCabe and Lewin, 1992). Key to the success of the ombudsperson's office is the idea that it is outside of ordinary organizational hierarchies and structures so that the ombudsperson maintains a position of independence and neutrality in assisting persons within the organization. In contrast to more formal grievance procedures, ombudspersons tend to employ informal and consensual approaches to resolving conflicts. Depending on the situation, the ombudsperson may play a role in resolving a dispute akin to that of a mediator or more in the role of an advocate for the employee.

Establishment of an ombudsperson's office can be costly in that it generally requires hiring one or more persons dedicated to this particular function. For this reason, ombudsperson offices are more common in large organizations than in small (Feuille and Delaney, 1992). The cost of devoting specific personnel and resources to the ombudsperson's office represents a limitation of this type of procedure from an efficiency perspective (Lipsky, Seeber and Fincher, 2003). On the other hand, the ombudsperson may enhance efficiency by promoting more

cooperative relations between employees within the organization. From an equity perspective, the strength of the ombudsperson is that they can get employee problems or complaints addressed by managers who would be less likely to respond to an employee acting on their own. However the lack of formal procedures and open hearings under an ombudsperson procedure also creates a problem of lack of guarantees of equal treatment and uncertainty over the degree to which employee interests are really being protected under this type of procedure.

From a voice perspective, an advantage is that a central part of the ombudsperson's role is to assist employees in the resolution of problems, whereas typical nonunion grievance procedures lack anyone whose main role is to represent or assist the employee bringing the complaint. The ombudsperson may help employees give voice to complaints that the organization would otherwise not listen to (Westin and Felieu, 1988). At the same time, it is important to recognize that while ombudspersons may claim neutrality, within the corporate setting they are generally still employees of the organization and so the degree to which they represent a genuinely independent voice on behalf of employees seeking their assistance can be questioned. As with peer review, by introducing an ombudsperson's office an organization accepts some reduction in efficiency in order to enhance equity and voice. Although both peer review and ombudsperson's offices may still have deficiencies in the areas of equity and voice relative to union grievance procedures, they are noteworthy in representing attempts to alter the geometry of dispute resolution in the nonunion workplace to achieve a better balance between efficiency, equity, and voice.

Employment Law Procedures

A special set of workplace rights disputes pertain to alleged violations of statutory employment laws or common law principles. In many countries, these employment law disputes

are resolved through specialized labor courts or industrial tribunals that feature expert decision-makers and simple, expedited procedures. In contrast, in the United States, claims of employment law violations are usually resolved through the general court system. This use of the general court system to resolve claims such as illegal employment discrimination results in relatively elaborate pre-trial and trial procedures, the use of juries as decision-makers, and much larger monetary damage awards than found in other systems. The nature of the courts in the United States produces a system for enforcing employment laws that very strongly emphasizes equity and provides for a strong, albeit relatively formal, structure for employee voice.

The major weakness of the system is in the area of efficiency. Resolution of disputes through jury trials in the courts is extremely expensive relative to other systems and raises concerns of both access to the system and waste of resources. Partly in reaction to these concerns, there has been growing efforts to use alternative dispute resolution procedures, including both mediation and arbitration, to resolve employment law disputes. Although these ADR procedures hold the potential to reduce the overall costs and time of resolving disputes, these procedures, particularly mandatory employment arbitration, have also been strongly criticized as excessively sacrificing equity in order to achieve greater efficiency. We begin by examining resolution of employment law disputes through litigation in the courts using the metrics of efficiency, equity and voice, then turn to employment law arbitration and mediation.

Employment Law Litigation

Given the default rule of employment-at-will, under which an employer can fire an employee for "good reason, bad reason, or no reason at all," employment litigation in the United States generally consists of claims under one of the statutory or common law exceptions to the at-will rule (Weiler, 1990; Wolkinson and Block, 1996). The major statutory exceptions pertain

to non-discrimination. Employment discrimination claims first became a major component of American employment law with the passage of Title VII of the Civil Rights Act of 1964, outlawing discrimination in employment based on race, color, national origin, sex and religion. Later statutes extended the prohibited categories of discrimination to include age and disability. The key mechanism for enforcement of these rights against discrimination in employment is litigation through the courts.

Beginning in the 1970s and 1980s, state courts also recognized a limited set of exceptions to the at-will rule, falling into three general categories: dismissals against public policy; an implied covenant of good faith and fair dealing, and implied contracts (Edwards, 1993). Employment law claims based on these exceptions are tried in state courts under ordinary litigation procedures with the availability of jury trials and damage awards that can include punitive damages. While Title VII initially provided for trial by judge only in the federal courts (out of concern at the time for the influence of pro-segregation southern juries), this was amended by the Civil Rights Act of 1991 which allowed for both trial by juries and broader compensatory and punitive damages. The result of the gradual expansion of employment discrimination law since the 1960s has been the growth of employment discrimination claims as one of the largest categories of litigation in the federal court system. In one sense this reflects the effectiveness of litigation as a system for addressing continued discrimination in the workplace. At the same time, it has led to concerns about the appropriateness of litigation as a dispute resolution system (Commission on the Future of Worker-Management Relations, 1994). We can evaluate these concerns using the efficiency, equity and voice metrics.

The great strength of the system of litigation in the courts is its strong focus on equity in resolving disputes. In order to ensure that all relevant information is considered in the decision-

making process, extensive pre-trial procedures allow for discovery of written documents and deposition of witnesses. At the trial itself, both the employee and the employer are able to fully test the claims of the other side through presentation and cross-examination of witnesses. To enhance the fairness of the decision, a jury of twelve unbiased people are empowered to render a verdict on the claim, with an experienced judge present to resolve any questions of law. To further ensure equity in the process, any errors of law in the trial can be appealed to higher courts to be resolved by a panel of highly experienced judges.

The downside to the strong equity protections of the litigation system is the resulting limitations of the system from an efficiency perspective. While the elaborate pre-trial discovery procedures of litigation maximize the likelihood that all relevant information comes to light before trial, this also requires extensive time and effort and may involve sifting through large amounts of irrelevant or unimportant information. Resolving workplace rights disputes through the U.S. court system is anything but speedy. At the trial itself, in addition to the direct costs to the parties of attorneys and expert witnesses, there are substantial costs borne by the public of providing judges and the lost productivity of citizen jurors who are required to be absent from their own jobs for the period of the trial.

From the perspective of voice, the litigation system has both strengths and weaknesses. A key strength is the ability of a plaintiff employee to obtain a full hearing of an employment law claim against an employer. The system, quite literally, ensures the employee will get their day in court and the opportunity to have their positions fully presented. At the same time, the complexity of legal rules requires that a professional attorney be retained to oversee and present the case. Complex legal rules can also often channel cases to focus on issues different from or in addition to the underlying interests that initially motivated the dispute. For example, an

employee who is dismissed after many years of loyal service may be motivated to bring suit in order to give voice to feelings that the employer has violated the employee's trust, yet in litigation the case may need to be framed as an age discrimination case to provide a legal basis for the claim. Another voice aspect of the litigation system is provided by the jury, which serves as a voice of the community or the public. In particular, the ability to award punitive damages allows the jury to give voice to the view that an employer has engaged in conduct that far exceeds the boundaries of acceptable behavior. An additional voice aspect of the litigation system is that this is a public system in which the laws and rules governing the system are established through the democratic process.

Employment Law Arbitration

The costs and inefficiencies of the litigation system have been a driving force in the increasing use of alternative dispute resolution procedures to resolve employment law disputes in the United States. One major development in this area is the growth of employment law arbitration as an alternative mechanism for resolving employment discrimination and other legal claims. During the 1980s, the courts increasingly moved towards a position of favoring the diversion of statutory claims into arbitration procedures, in part as a way to reduce high caseloads in the federal courts (Stone, 1999). In 1991, this shift in the law of arbitration was extended into the employment realm by the case of *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), where the U.S. Supreme Court for the first time held that a claim based upon a statutory employment right, in this case an age discrimination claim, could be subject to arbitration. Over the course of the 1990s, large numbers of employers began requiring their employees to sign agreements as a term and condition of employment to submit any future legal claims against the employer to arbitration (Colvin, 2003a).

Employment law arbitration holds significant potential advantages over litigation from an efficiency perspective. Rather than requiring a judge, a twelve-person jury and various court officers, arbitration typically occurs before a single arbitrator. Arbitration procedures are generally simpler and more expedited than litigation procedures. In particular, pre-trial discovery procedures are much less extensive in arbitration than in litigation. All of this serves to reduce the time and cost involved in bringing a claim through arbitration compared with litigation, creating greater efficiencies in the system (Estreicher, 2001; Hill, 2003).

Employment law arbitration, however, can be strongly criticized from an equity perspective. The simplification of procedures in arbitration that enhances efficiency has been criticized as sacrificing equity through the elimination of due process protections (Stone, 1996). In particular, the more limited pre-trial discovery procedures of arbitration may seriously limit the ability of plaintiff employees to gather information necessary to support their claims. This concern is heightened in employment law cases because much of the relevant information, such as personnel records and files or witnesses who are employees, is under the control of the employer. The use of professional arbitrators as decision-makers has also been criticized from an equity perspective as creating a danger that arbitrators will tend to be biased towards employers, who are likely to be repeat players in the system, over employees, who are more likely to be single-time players in the system (Bingham, 1997). Another concern with arbitrators as decision-makers is that they will be much less likely than juries to make large punitive damage awards to punish egregious employer misbehavior (Colvin, 2001). On the other hand, some argue that employment arbitration may have an equity enhancing effect by lowering costs and thereby making it easier for employees to bring claims than with litigation (Estreicher, 2001). More efficient and equitable outcomes might also result because compared to broadly-trained judges

and inexperienced juries, employment law arbitrators can have specialized knowledge of employment law and a greater sensitivity towards the nature of the employment relationship and the standing of individual employees in the dispute resolution system.

Issues of voice have received less attention in evaluations of employment arbitration. Voice is present in the ability of the employee to present their case in arbitration. The employee also has some voice in the selection of the arbitrator under typical arbitrator selection procedures that involve both parties alternately striking names off a list provided by an organization such as the American Arbitration Association until one name remains. The main weakness of employment arbitration from the standpoint of voice is that the employer controls the development and adoption of the procedure. Given that employers usually require employees to agree to arbitration of future disputes as a mandatory term and condition of employment, this type of procedure is often referred to as mandatory or compulsory arbitration. In other words, employees have no voice in choosing or designing the nature of the dispute resolution system to be used. In this respect, employment arbitration compares unfavorably with labor arbitration, where voice is provided by joint union and management negotiation of the contractual rules under which arbitration occurs. Lastly by shifting enforcement of public employment laws from the public forum of the courts to the private forum of arbitration, use of employment law arbitration may reduce the degree of voice provided through the democratic political process.

Employment Law Mediation

Employment law mediation provides another alternative to litigation for resolving employment disputes that attempts to strike a different balance between efficiency, equity and voice. In mediation, a neutral mediator helps resolve the dispute by facilitating negotiation of a settlement between the parties (Lipsky, Seeber and Fincher, 2003). While long used to resolve

interest disputes, mediation has been increasingly used to resolve employment law claims in the United States. The Equal Employment Opportunity Commission (EEOC) and U.S. Department of Labor have launched programs to encourage mediation of employment disputes (Lipsky, Seeber and Fincher, 2003). Some states, for example Massachusetts (Kochan, Lautsch and Bendersky, 2000), have also launched programs encouraging mediation of state level employment discrimination claims. In addition, a number of companies that have adopted employment arbitration procedures have also included mediation in their procedures as a step prior to arbitration (Colvin, 2004).

Employment law mediation increases efficiency relative to litigation by encouraging quicker, less costly resolution of disputes. Mediation may also have advantages relative to arbitration on the efficiency dimension. For example, where companies have introduced ADR procedures including separate mediation and arbitration steps, a lot of the benefit of faster and cheaper resolution of disputes has come from mediation rather than arbitration (Colvin, 2004). Indeed one of the reasons companies have introduced mediation as a step prior to arbitration is the fear of high costs if large numbers of employees proceed to arbitration. From the perspective of equity, mediation has the advantage that resolutions consist of consensual agreements between the employee and employer. As a result, some of the concerns about bias in decision-making that have been directed at employment arbitration are diminished with employment law mediation. From a voice perspective, employment law mediation has the advantage that the employee has a voice in both the process and result of dispute resolution. If the employee does not agree with the proposed settlement, they can simply decline to reach an agreement. However, it is of concern that some research suggests that in employment mediation occurring as a pre-arbitration step in employer-promulgated procedures, many employees do not have a representative, or only a non-

attorney representative such as a family or community member or a fellow employee (Colvin, 2004). The danger here is that employees without legal representation may not realize that they are giving up possible legal claims in a mediation settlement.

The Geometry of Dispute Resolution Procedures

Hyman (2001) analyzes European trade unionism against a triangle of market, society, and class and labels this the "geometry of trade unionism." Budd (2004) analyzes employment institutions against a triangle of efficiency, equity, and voice and labels this the "geometry of the employment relationship." Analyzing dispute resolution procedures in this framework yields the "geometry of dispute resolution procedures." Figure 1 summarizes the geometry of dispute resolution procedures for rights-based workplace disputes.

Unionized grievance arbitration has a relatively strong provision of voice and especially equity (though the limitation of coverage to unionized workplaces limits equity when considering the entire U.S. employment system). There are concerns with voice to the extent that the process is very formal. The larger weaknesses are in the area of efficiency with significant concerns regarding cost, speed, and flexibility. In comparison, expedited arbitration performs better on the efficiency dimension because of reduced costs and increased speed, but at the expense of a degree of equity and voice. The inclusion of a mediation step before arbitration improves efficiency with only minor trade-offs with equity and voice and thus has the potential to better balance efficiency, equity, and voice.

In comparison to union procedures, nonunion grievance procedures tend to emphasize efficiency at the expense of equity and voice. The imbalance in favor of efficiency is seen most strongly in open door policies that provide little protection of equity or voice. Management appeal procedures provide a limited enhancement of equity through the formalization of

structures for reviewing employee complaints, while continuing to emphasize efficiency through management control of the process and outcomes. Peer review and ombudsperson procedures represent more substantial attempts to achieve greater balance in the geometry of dispute resolution in the nonunion workplace. Peer review enhances equity and voice through the mechanism of employee involvement in the grievance decision making process. Ombudspersons enhance equity and voice through a relatively flexible, informal approach to assisting employees in getting complaints heard and resolved. Both peer review and ombudsperson procedures require more substantial commitment of resources by the company as well as limitations on management discretion, resulting in some sacrifice of efficiency. Although not involving the strongly developed institutional structure of union grievance procedures, these procedures are noteworthy as indicating attempts within nonunion workplaces to achieve an improved balance between efficiency, equity and voice in dispute resolution.

For resolving employment law disputes, both employment law mediation and arbitration represent attempts to rebalance the geometry of dispute resolution relative to litigation. Employment litigation is a system with a strong imbalance in favor of equity, with some strong voice elements, but a lack of efficiency. Employment law arbitration imbues the system with greater levels of efficiency, but leads to questions of whether it sacrifices too much in the areas of equity and voice. The compulsory nature of most employment law arbitration schemes also raises very serious concerns with equity and voice. Relative to arbitration and litigation, mediation provides a greater balancing of efficiency, equity and voice for resolving employment disputes. The main question in regard to mediation is whether it is appropriate, given its emphasis on private, consensual dispute resolution, for employment law cases that involve major

questions of public policy. However, for more routine employment law cases, employment mediation provides arguably the better balance in dispute resolution.

Conclusions

A range of choices exist of possible procedures for resolving workplace disputes, with important resulting implications for employment systems. Although these choices have sparked strong debates, consistent dimensions for comparing procedures are often lacking. To evaluate the available choices, there is a need for metrics for comparing dispute resolution procedures. We argue that the objectives of efficiency, equity, and voice provide rich metrics for evaluating and comparing workplace dispute resolution procedures. In the analysis presented here, we have shown how efficiency, equity and voice can be used to compare unionized and nonunion workplace procedures, as well as employment law procedures.

Furthermore, we argue that dispute resolution procedures are more effective where efficiency, equity and voice are balanced. Within each of the categories of procedures examined here, we can see efforts to improve procedures by achieving greater balance between efficiency, equity and voice. For unionized procedures, expedited arbitration and grievance mediation represent efforts to remedy limitations in efficiency in grievance arbitration. By contrast for nonunion procedures, the development of peer review and ombudsperson procedures represent efforts to remedy the lack of equity and voice in open door or management appeal procedures. Finally amongst employment law procedures, both employment mediation and arbitration represent efforts to shift the balance relative to litigation, which strongly emphasizes equity and voice over efficiency. Even if one disagrees with specific analyses herein, such debates underscore the need for metrics, and the utility of the efficiency, equity, and voice framework for analyzing and designing dispute resolutions procedures—in and out of the workplace.

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Table 1. Three Metrics for Dispute Resolution

Dimension/Definition	Dispute Resolution Concerns
Efficiency	
Effective use of scarce resources	Cost Speed Promotion of productive employment
Equity	
Fairness and justice	Unbiased decision-making Effective remedies Consistency Reliance on evidence Opportunities for appeal
Voice	
Ability to participate and affect decision-making	Hearings Obtaining and presenting evidence Representation by advocates and use of experts Input into design and operation of a dispute resolution system Participation in determining the outcome

Figure 1. The Geometry of Dispute Resolution